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**In the United States District Court
for the District of Utah, Central Division**

RANDY WAHL,

Plaintiff,

vs.

JO ANNE B. BARNHART, Commissioner of
Social Security,

Defendant.

**MEMORANDUM DECISION
AND ORDER**

Case No. 2:03cv270 JTG

This matter is before the court on Randy Wahl's petition for review of the decision rendered by the Commissioner of Social Security denying his application for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB") pursuant to 42 U.S.C. § 405(g). The parties have submitted briefs in support of their positions. No oral argument has been requested and none is deemed necessary by the court. Having considered the written submissions, the court now enters the following Memorandum Decision and Order.

I. PROCEDURAL HISTORY

Randy Wahl ("claimant") originally filed his claim in California for DIB and SSI

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with a protective filing date of April 24, 1996, alleging back pain, Crohn's disease¹ and eczema² which had prevented him from working since December 1995. Claimant's application was denied initially and upon reconsideration. He was given a hearing date in California, but requested a transfer to Utah. When he failed to show up for the hearing his case was dismissed. The mistake was appealed and the dismissal was vacated. Petitioner finally was given a hearing before an Administrative Law Judge (ALJ) here in Utah on July 27, 1999.

II. FACTUAL BACKGROUND

Claimant is a 45 year-old male who never completed high school, but has taken some college courses. Claimant currently works part time as a janitor for Nebo School District, but is unable to work summers due to the heavier nature of the work. He has previously worked as a spring maker, a waiter, a server and a machinist. Claimant has had complaints of back pain with radiation down his left leg since 1994. In the spring of 1995 he presented at the emergency room with complaints of rectal bleeding and dizziness. It was thought to be an exacerbation of Chron's disease and for the next few months claimant underwent a number of tests.

Claimant continued to experience back pain six months prior to the alleged onset of disability, but no additional injury occurred prior to his stopping work. In early 1996,

¹ Crohn's disease is an "inflammatory disease of the gastrointestinal tract. . . . Common symptoms include recurrent abdominal pains, fever, nausea, vomiting, weight loss and diarrhoea [sic.] which is occasionally bloody. Complications include gastrointestinal bleeding, fistulas and anal fissures." <http://medical-dictionary.com>.

² Eczema is "an inflammatory condition of the skin, characterized by redness, itching, and oozing vesicular lesions which become scaly, crusted or hardened." Merriam-Websters Medical Dictionary 194 (Paperback ed. 1995).

claimant did strain his back and received several steroid injections. An MRI in 1998 revealed desiccation³ of the spine as well as a mild disk protrusion.

In the fall of 1998 claimant was treated for a duodenal ulcer with a heater probe which cleared up all symptoms of his Chron's disease. Claimant continued to have back pain and was treated by a pain specialist in early 1999. He had several steroid injections which he claimed made a 50% improvement in the pain. He also continued to use other pain medication to manage the pain. In the summer of 1999 claimant was treated for depression with an antidepressant.

III. THE FIVE STEP SEQUENTIAL PROCESS

There is a five step process to determine whether a claimant is disabled pursuant to 20 C.F.R. § 416.920:

- 1) If the claimant is performing substantial gainful work she is not disabled.
- 2) If the claimant is not performing substantial gainful work, her impairment(s) must be severe before she can be found to be disabled.
- 3) If claimant is not performing substantial gainful work and has a severe impairment(s) that has lasted or is expected to last for a continuous period of at least twelve months, and her impairment(s) meets or medically equals a listed impairment contained in Appendix 1, Subpart P, 20 C.F.R. § 404, (hereinafter "Listing") the claimant is presumed disabled without

³ Desiccation is the "complete or nearly complete deprivation of moisture or of water." Merriam-Webster's Medical Dictionary, supra at 171.

further inquiry.

- 4) If the claimant's impairment(s) does not prevent her from doing her past relevant work, she is not disabled.
- 5) Even if the claimant's impairment(s) prevent her from performing her past relevant work, if other work exists in significant numbers in the national economy that accommodates her residual functional capacity and vocational factors, she is not disabled.

The ALJ followed the Five Step Sequential Process and determined although claimant was working as a janitor at the time it was only part time and he was not earning enough for it to qualify as substantial gainful activity. At steps two and three the ALJ found that claimant's impairments were severe but not sufficient to meet a listing. At steps four and five, the ALJ found that although claimant could not perform his past work he had the residual functional capacity (RFC) to perform "light work," and that there was work in the national economy that he could perform with this RFC. As a result, the final decision of the ALJ was that claimant was not disabled.

IV. ARGUMENTS

Claimant makes three arguments as to why the ALJ's decision should be reversed or remanded:

1. The ALJ improperly evaluated claimant's complaints of pain
2. The ALJ's negative credibility finding is not sufficiently supported by the evidence

3. The ALJ failed to consider the cumulative effects of claimant's combined impairments, which meet or equal a Listing impairment

The Tenth Circuit has described the scope of review in a Social Security case appealed from the administrative level as "narrow" saying, "[w]e must affirm the decision of the Secretary if the decision is supported by substantial evidence and [the ALJ] gives adequate reasons for his decision. Eggleston v. Bowen, 851 F.2d 1244, 1246 (10th Cir. 1988) (internal citations omitted).

A. Complaints of Pain and Credibility

Claimant's pain complaints and credibility should be assessed together since the case law indicates credibility is part of the evidence used in assessing subjective complaints of pain.

The three considerations in assessing whether pain is disabling are

(1) whether Claimant established a pain producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1375-76 (10th Cir 1992). In looking at the subjective complaints of pain, the ALJ must also consider whether those allegations are credible. See id.

Claimant seems to argue that he does in fact have a pain producing impairment, implying that the ALJ concluded claimant's impairment was not pain producing. This does not appear to be the ALJ's conclusion, rather he states "the undersigned notes that the claimant's activities of daily living are inconsistent with the degree of limitation alleged." (Tr. 17). The

ALJ rejected the complaints of pain not because claimant's impairment could not produce pain, but the ALJ did not believe that his impairment produced the amount of pain he claimed. Therefore, the ALJ rejected the subjective pain complaints because of the credibility of the claimant.

"Credibility determinations are peculiarly the province of the finder of fact, . . . and we will not upset such determinations when supported by substantial evidence." Winfrey v. Chater, 92 F.3d 1017, 1020 (10th Cir. 1996) (citing Diaz v. Sec'y of Health & Human Servs., 989 F.2d 774, 777 (10th Cir. 1990)).

In this case there is sufficient evidence in the record for the ALJ to have found the claimant "lack[ed] full credibility" (Tr. 17). In the record claimant alleged that he could not sit for more than 15 minutes, but at the hearing he testified that he drove to the hearing by himself without stopping for more than one hour. Additionally, claimant reported to his doctor and after a second steroid injection he felt "almost complete relief of his lower extremity pain" but he continued to have back pain. (Tr. 157). A little over a month later he reported he felt "50% improved" so much so he was willing to reduce his Lortab. (Tr. 155). At the hearing however, claimant testified that he never got any relief from the second or third injection. (Tr. 259). These inconsistencies in the record may be relied upon by the ALJ to make a credibility determination. See Eggleson v. Bowen, 851 F.2d at 1247. This is not a case where the "special deference" ordinarily given to an ALJ's credibility determination is overcome by the evidence. See Ricketts v. Apfel, 16 F.Supp.2d 1280, 1291 (D.Colo. 1998).

B. Meeting the Listing.

Claimant argues that the ALJ erred in failing to find that claimant meets or medically equals the listings 1.05c, 12.04, 12.06, 12.08, and 12.09. Listing 1.05c deals with “vertebrogenic disorders” (i.e. the back pain), while the others all have to do with mental disorders.

Listing 1.05c reads:

C. Other vertebrogenic disorders (e.g. herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

The ALJ noted that claimant suffered from degenerative disc disease but that his treating physician noted : “claimant’s muscle strength, reflexes, sensation, and range of motion are all normal.” (Tr. 15). Although it is clear that claimant suffers from back pain, there is nothing in the record to indicate that the claimant has significant motor loss and significant limitation of the spine, both of which are needed to meet the listing. The ALJ’s decision is based on substantial evidence in the record.

With regard to the mental disorders, claimant did not apply for disability alleging depression, but because his doctors began treating depression in 1999 the ALJ sent claimant for a consultative mental exam. Claimant was diagnosed with major depression, generalized anxiety disorder, polysubstance dependence in partial remission, and personality disorder not otherwise specified. However, his memory was intact and his concentration and focus were not impaired.

The four psychiatric listings analyzed by the ALJ included those for affective disorders, anxiety related disorders, personality disorders, and substance addiction disorders. In order for a claimant to be disabled under any of these Listings the disorder must create functional limitations that are more than moderate and result in a complete inability to function independently outside the area of one's home.

The ALJ concluded that the claimant's mental disorders did not reach the degree necessary to meet any of the listings. The report of the psychological exam supports the ALJ's conclusion and the decision is therefore supported by substantial evidence.

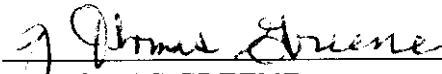
V. CONCLUSION

The claimant is unable to point to anything in the record which would lead the court to find the ALJ's decision is not supported by substantial evidence. The decision by the Social Security Administration should be upheld. Accordingly, claimant's petition for remand or reversal is hereby

DENIED.

IT IS SO ORDERED.

DATED this 10th day of February 2004.



J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

United States District Court
for the
District of Utah
February 13, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00270

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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